Hastings Law Journal

Volume 1 | Issue 2 Article 2

1-1950

Worthless Check Cash Sales, Substantially Simultaneous and Conflicting Analogies

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WORTHLESS CHECK CASH SALES, "SUBSTANTIALLY SIMULTANEOUS" AND CONFLICTING ANALOGIES[1]

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"Oft to every judge and lawyer,
Comes the moment to decide,
In the strife of Truth with Falsehood,
For the good or evil side."
(With apologies to James Russell Lowell.)

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"Thou shalt not steal."
"Thou shalt not covet thy neighbor's house, . . .
. . . nor his ox, nor his ass, nor anything
that is thy neighbor's."
Exodus, XX, 15, 17.

"Thou shalt not bear false witness against thy neighbor."
Exodus, XX, 16.

I. *"Substantially Simultaneous" Is as Applicable to Payment by Check as It Is to Delivery of Goods.*

The fact that the delivery of goods bargained for may be a more cumbrous operation than handing goods over the counter does not prevent the transaction in question from being a technical cash sale where delivery is made on the understanding that payment is to be substantially simultaneous.[2]

[1]This article attempts to make a tentative preliminary analysis of some of the underlying considerations involved. It does not attempt to set forth exhaustive lists of authorities. For present purposes illustrative instances are deemed sufficient.

[2]"The delivery of the sheep was a more cumbrous operation than handing goods over the counter: but even if it was completed before the representations were made, we think that on all the evidence fairly construed it must be taken to have been made on the understanding that the payment was to be substantially simultaneous: . . . For, even if the jury found that there was a completed delivery, still its operation was conditional upon immediate payment, and everything was *in fieri* until, by reason of what we must take to have been false pretenses, the seller was induced to accept a check instead of money, and to complete the sale on that change of footing. Up to that moment the title did not pass" . . . Holmes, J., in Commonwealth v. Devlin (1886), 141 Mass. 423, 6 N.E. 64, at page 67 of N. E. The case was one where sheep were to be sold by weight, in a cash sale transaction at the stock pens. About an hour after the process of weighing and delivery had been completed, when the parties met to reckon up the price from the weights and close the deal by payment, the buyer did not pay in cash as required. When the cash was dmanded he falsely represented that he had plenty of money in his bank account and that his check on a bank in another city was good, thereby inducing the seller to take the check instead of cash. This check was later dishonored on due presentation, there being insufficient funds in this buyer's deposit account.

It may be noted that at the time this case was decided, 1886, the use of checks was not nearly as common as today, and that all parties, including the jury, trial judge, and appellate court seem to have understood that by the false representations in question the buyer induced the seller to accept the check in payment in place of the cash.

It would seem, from testimony referred to in the report, that at the time he wrote the check the buyer had some expectations of getting a certain note discounted by a lender he knew, with the

Where the physical processes of delivery in such cases are completed before the payment is actually made the delivery is regarded as conditioned upon the making of the payment. This is the basic way in which the courts have looked at the facts in ordinary cash sale cases in order to carry into effect the basic intentions of the parties to make a simultaneous exchange of the goods for the price at the time of the bargain in transactions where literal and exact simultaneousness of delivery and cash payment is not practically possible.[3]

Modern common law judicial materials unhesitatingly have taken this view where, as often is the case, the cumbrousness of the operation of exchange of the goods for the price is found primarily in connection with delivery of the goods.[4] The great preponderance of American authority also has taken the same view where the cumbrousness of the operation of exchange of the goods for the price also involves the complication of payment by cashing a check through ordinary banking channels.[5] The fact that payment of the

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proceeds of which to cover this check before it could be presented. At the last moment his prospective lender refused because he had heard that some of this buyer's checks had gone to protest. The buyer was here convicted of obtaining property by false pretenses. His conviction was affirmed by the appellate court.

[3]Bishop v. Shillito (1819), 2 Barnewall and Alderson, 329, n.(a); Bussey v. Barnett (1842), 9 Meeson and Welsby, 312 (In a cash sale delivery of goods at the buyer's house, with payment therefor within ten minutes, no debt ever arose. Accordingly, evidence of the payment was admissible under the buyer's plea of "never indebted" when sued in an action of debt for goods sold and delivered); Paul v. Reed (1872), 52 N.H. 136 (buyer in cash case transaction having failed to pay when process of attachment was served before the money had been handed over, seller could retake the goods just delivered).

Giving legal effect to delivery and payment as if simultaneous where the parties intend them to be substantially simultaneous, even though in the practical operation of the processes of delivery and payment exact and literal simultaneousness cannot be achieved, is not confined to technical cash sale transactions. Thus, a mortgage given simultaneously with the mortgagor's acquisition of the property, or in contemplation of his acquiring the property immediately, can't be held inoperative as being merely a mortgage on property to be later acquired. A purchase money mortgage given in connection with taking of the title is a part of the same transaction irrespective of the order in which the formal papers are executed and delivered. See C.J.S., Chattel Mortgages, section 26, at page 627, and cases there cited. A vivid illustration is found in Banker's Investment Co. v. Meeker (1948), —— Kan. ——, 201 P.2d 117). In that case a purchase money chattel mortgage on an automobile was sustained though the record showed that the mortgage was executed before the mortgagor got from the seller assignment and delivery of the certificate of title and delivery of the automobile. The record also showed that the mortgage was executed to get the money to pay for the automobile, and that it was a part of the same general transaction of buying and financing the purchase of the automobile.

[4]See, for instance, Leven v. Smith (1845), 1 Denio (N. Y.) 571; Commonwealth v. Devlin (1886), 141 Mass. 423, 6 N.E. 64; Dalrymple v. Randall, Gee & Mitchell Co. (1919), 144 Minn. 27, 174 N.W. 520; Laskey v. Economy Grocery Stores (1946), 219 Mass. 224, 65 N.E.2d 305 (self-service grocery store).

[5]See, for instance, Keegan v. Lenzie (1943), 171 Ore. 194, 135 P.2d 717. A large number of cases to this effect are enumerated in Williston on Sales (3d ed., 1948) in section 346a, footnote 14. While the distinguished author criticizes these decisions he regretfully but candidly observes, in section 346b, that "It must be admitted that so far as the cases on worthless checks are involved the author's analysis is not supported by the weight of authority." For discussion by law review commentators, with citations of authorities relied on, see Howe, Bona Fide Purchaser—Without Title (1948), 36 Ky. L. J. 176-188; Protection of Purchaser from One Who Acquires Goods by

price bargained for may through the practice of payment by check be a more cumbrous operation than handing over currency directly between the parties does not prevent the transaction in question from being a technical cash sale where this form of payment is made on the understanding that it is to be substantially simultaneous with delivery.[6] It follows, accordingly, and the American judicial materials have preponderantly held, that where in a cash sale transaction, no credit being contemplated, the goods are delivered on the giving of a check for the price and the check is not paid on due presentation, the property interest in the goods never passes to the buyer. In consequence, in such cases, unless modifying analogies derived from other parts of the law can be found applicable to the given facts, the original seller prevails over the buyer's attaching creditors,[7] and also over purchasers of these goods from the buyer even though they be purchasers for value without

Giving Bad Check—Missouri Law (1948), 13 Mo. L. Rev. 211-217; Collins, Title to Goods Paid For with Worthless Check (1942), 15 So. Cal. L. Rev. 340 (critical of view taken by the weight of authority: see, in that regard, especially pp. 343-347); McCullough, Payment by Note or Acceptance —Whether Vendor May Recover Goods from Bona Fide Purchaser When Check in Payment Is Dishonored (1942), 20 Chi-Kent L. Rev. 182-9; Payment by Forged Check, Recovery of Goods by Original Seller from Bona Fide Purchaser (1942), 17 Tenn. L. Rev. 272-3; Markley, Right to Reclaim Delivered Goods in a Cash Sale (1932), 36 Dickinson L. Rev. 277; Effect of Payment by Check on Passage of Title (1920), 9 Cal. L. Rev. 78.

[6]After referring to the argument found in Williston on Sales, section 346, that where parties have bargained for a cash sale transaction a subsequent delivery by the buyer without limitation and without insisting upon contemporaneous payment ought to be regarded as conclusive evidence of waiver of the condition of cash payment, the court in People's State Bank v. Brown (1909), 80 Kan. 520, 103 P. 102, at page 103, continued as follows: "But as a practical necessity, to avoid the inconvenience of requiring the seller of an article to keep one hand upon it until with the other he grasps the currency tendered in payment, there must be some relaxation of this rule. Delivery and payment as a practical matter cannot be absolutely simultaneous. Some slight interval between the two acts is inevitable, and the criterion upon which the courts have agreed with substantial unanimity is that such interval does not conclusively prove a total abandonment of title and the right of possession by the seller, unless under all the circumstances of the case it in fact shows that result to have been intended. . . .

"The fact that Brown accepted a check did not imply an extension of credit, or preclude the exercise of the right of reclamation in the case of its nonpayment on time presentation." (Citing authorities.)

Morehouse v. Keyport Auto Sales Co. (1935), 118 N.J.Eq. 368, 179 A. 279, was a case where the buyer paid the original seller for an automobile with a worthless check, got delivery and the same day mortgaged to a chattel mortgagee for a sum which was to enable the buyer to pay for this automobile, but which the buyer did not use for that purpose. The buyer's check was dishonored on due presentation. The seller demanded the return of the car. In the resulting litigation the court found in favor of the original seller against the buyer's chattel mortgagee. At page 280 of 197 A., the court stated as follows: "General Credit Corporation contends that in accepting the dealer's check the seller extended credit to the buyer at least for the period between the time when the check was accepted and the time it was presented for payment. To that contention there is no merit, for the generally accepted rule is that the acceptance of a check 'does not imply an extension of credit, or preclude the exercise of the right of reclamation in the case of its nonpayment upon timely presentation' (citing authorities) . . . Pending payment the delivery is conditional only."

[7]A few typical cases are the following: South San Francisco Packing & Provision Co. v. Jacobson (1920), 183 Cal. 131, 190 P. 628; Towey 1. Esser (1933), 133 Cal.App. 669, 24 P.2d 853; Publicker Commercial Alcohol Co. v. Harger (1943), 129 Conn. 655, 31 A.2d 27; People's State Bank v. Brown (1909), 80 Kan. 520, 103 P. 102.

notice.[8] What the original buyer does not have he cannot transfer. The purchaser from one who has nothing, gets nothing, even though he may have paid value in good faith without notice.[9]

II. *The Challenge on the Score of Intent.*

It has been earnestly contended that the application of this traditional technical cash sale position to worthless check cash sale cases is intrinsically unsound.[10] The reasons given for this conclusion by its most distinguished protagonist seem to be based primarily on the assumption, asserted as a matter of fact, that the seller in such cases in making delivery to the buyer on receiving the buyer's check for the price actually intends to exchange the ownership of the goods for the check which he then receives rather than for the money he receives when the check is cashed.[11] This assumption as to the actual intention of the parties may have some basis in the actual facts of the market place where certified checks are involved, in that certified checks frequently are treated by the parties as the equivalent of actual cash.[12]

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[8]Typical cases are Clark v. Hamilton Diamond Co. (1930), 209 Cal. 1, 284 P. 915 (diamond ring); Morehouse v. Keyport Auto Sales Co. (1935), 118 N.J.Eq. 368, 179 A. 279 (automobile).

A long list of cases to this effect is given in Williston on Sales (3d ed., 1948), section 346a, footnote 14.

[9]This fundamental principle in property law is expressed in the Uniform Sales Act, section 23(1), as follows: "Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

It may be added that section 23(1) of the Uniform Sales Act may at times be found inapplicable because the facts in question are regarded as coming within section 23(2), which reads as follows: "Nothing in this act, however, shall affect——

"(a) The provisions of any factor's acts, recording acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.

"(b) The validity of any contract to sell or sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction."

[10]Williston on Sales (3d ed., 1948), sections 346a and 346b. Echoes of the argument there presented have appeared in various law review articles, some of which are mentioned in footnote 5 above. In Nelson v. Lewis (1936), 143 Kan. 106, 53 P.2d 813, this view, attributed to this source, became the basis for the court's decision.

[11]"But the real question is, did the seller assent to transfer the ownership in the goods, and it can hardly be doubted that he did. . . . But where the goods are put into the buyer's hands without more, it can hardly be doubted that the seller means to allow him to deal with them as his own; to resell them immediately if he feels so inclined." (Williston on Sales (3d ed., 1948), sec. 346a.)

"A delivery to the buyer with authority to use the goods immediately should be conclusive evidence of transfer of the property in the absence of clear evidence showing an intention to reserve the title." (Williston on Sales (3d ed., 1948) sec. 346b.)

"The seller in fact intends to exchange the ownership of the goods for the check which he receives." (Williston, The Progress of the Law (1921), 1919-1920 Sales, 34 Harv.L.Rev. 741, at page 749.)

[12]According to the overwhelming weight of authority in this country the presumption is that payment by mere personal check is accepted only as conditional payment until the check is cashed. (See Williston on Contracts (2d ed., 1938), vol. 6, sec. 1875F, footnote 4.)

Where the seller delivers to the purchaser on receiving a certified check for the price, however, the inference can be much more readily drawn that the seller accepted the certified check in absolute

This fact assumption, that the seller in accepting the buyer's mere personal check actually has the intention of exchanging the ownership of the goods for the check that he receives rather than for the money he receives when the check is cashed, seems extremely questionable. It is extremely unlikely in most cases that the parties in such dealings in the real life of the market place in reality thus particularize their actual intentions. It seems much more nearly accurate on the fact realities of ordinary transactions in the market place to say that the parties usually have no occasion to formulate and particularize with nicety just what the resulting legal relations from moment to moment until the check has been cashed are intended to be. In most cases, expecting no difficulties of this nature to arise, it seems most likely that the parties do not formulate their ideas on this technical matter at all. In other words, in most cases the parties do not at the time think in detail about this technical matter at all, either one way or the other.[13]

It may be that in some unusual case the parties may have doubts about this matter which enter the stage of conscious reflection over what the resulting legal relations are to be pending the cashing of the check. In such unusual cases, in the absence of reservations expressed to the other party on that matter, the intention consciously adopted, if any, that seems the most likely would seem to be that the usual and customary legal relations are to apply though the parties in the instance may not be prepared to express those legal

payment. Thus in Goddard Grocery Co. v. Freedman (Mo.App, 1939), 127 S.W.2d 759, a fraudulent buyer who was a total stranger to the seller bought and received delivery of 300 pounds of sugar on paying with a certified check. The buyer immediately thereafter hauled away the sugar and sold it for cash at a lower price to a purchaser for value without notice. The certified check proving to be a forgery was dishonored by the drawee bank. The original seller then traced the sugar and brought an action of replevin to recover it from the sub-purchaser. He contended that the transaction had been a technical cash sale, and that as the check could not be cashed no payment had been made and consequently the property interest had never passed. The court held in favor of the sub-purchaser, however, viewing the facts as showing that in the instance the seller at the time of the transaction had accepted the certified check in absolute payment. The same explanation, in substance, accounts for the case of Parr v. Helfrich (1922), 108 Neb. 801, 189 N.W. 281, wherein the Supreme Court of Nebraska held that it was a question for the jury on the facts in evidence whether or not title had passed to the buyer at the time of the transaction when he paid with a purported certified check, which later proved to be a forgery, and received delivery of an automobile which he shortly thereafter sold and delivered to a purchaser for value without notice.

[13]With the countless number of transactions that are constantly occurring at the market place in which a seller delivers goods to a buyer on receiving the buyer's check for the price, participants in such transactions may readily be asked regarding such transactions what their actual intentions were as to this matter. The writer of this article has on various occasions tried such questioning. The answers, it seems, are readily shaped either way by the form in which the question is asked. The same person may readily answer one way and then the other in response to the varying forms in which the question may be put without showing any definite awareness that such opposite answers are contradictory. The average participant in such a marketing transaction is not a lawyer and usually has no special reason for analyzing in detail what the resulting relations during the successive stages of performance may be. Such an average participant, it has seemed very clear, ordinarily has not at the time thought out the details about this technical matter at all, either one way or the other.

relations with verbal exactness. In other words, even in such unusual cases the most likely intention actually held by the parties would seem to be a general intention that the usual and customary legal rules are to apply.

In connection with this argument about the intention of the parties in worthless check cash sale cases the suggestion has been included that, on the traditional cash sale analysis, if the buyer should use the goods in the meantime before the check is actually cashed the buyer would be a tort feasor even if the check were good.[14]

No support of judicial authority for this suggestion has been found. The suggestion itself seems to involve a conspicuous *non sequitur*. It is the fact in many restaurants that meal tabs are issued as food is served, the customer in accordance with the usual practice then eating the food at the tables provided for the purpose and paying the cashier on leaving. The delay and inconvenience incident to collection of cash at the very moment food is served is thus avoided. In such cases, certainly, it is not a tort for the customer at the restaurant to eat the food before he pays for the service. This is true even under the orthodox view that service of food is not a sale, provided he performs the conditions on which the food was served by making payment in ordinary course as he leaves. Here is one more illustration, clearly enough, where a physically measurable interval elapses though service on credit is not contemplated, the practical details having been arranged by the parties on the basis of the exchange of the service for the price being regarded as "substantially simultaneous."

It seems very clear, in any event, that where the seller makes delivery to the buyer on receiving his personal check for the price the seller retains no technical legal lien on the goods. A seller's legal lien on the goods under the common law codified in the Uniform Sales Act depends on possession, and is lost by delivery of possession to the buyer.[15]

It seems reasonably clear, therefore, that so far as the parties in the usual transactions have thought about this technical matter at all they either in reality must have regarded it as amounting to a substantially simultaneous exchange or in reality they must have regarded it as calling for the seller's giving unsecured credit to the buyer for the interval to elapse before the personal check could be cashed. Rarely indeed, if ever, would parties in the transactions in the market place actually so particularize their intentions as consciously to introduce the further technical legal distinction in such

[14]Williston on Sales (3d ed., 1948), section 346a.

[15]Uniform Sales Act, section 56. Local statutes in a few jurisdictions, however, have given sellers of goods on certain conditions liens upon the materiel after delivery. See Williston on Sales (3d ed., 1948), section 511, and footnote 12, referring to materials from Georgia, Mississippi, and Virginia.

cases, which lawyers in their chambers could on occasion figure out when appropriate facts appear, that some sort of equitable lien should still remain enforceable between the parties themselves to protect the seller against the buyer's possible fraud, but should not be available to protect the seller against a later purchaser from the buyer for value without notice. If the seller at the time of the bargain suspects fraud on the buyer's part with regard to the check, he is not likely to deliver the goods on tender of such a check. In the ordinary transaction in the market place, therefore, so far as actual intention of the parties on this matter can be identified the transaction seems most likely to be regarded as amounting to a substantially simultaneous exchange. There is no reason for supposing that the parties in such cases intend instead that the seller is to give utterly unsecured credit to the buyer for the interval until the check can be cashed.[16]

Unless credit is arranged for, therefore, isn't there a "substantially simultaneous exchange" envisioned by the parties, even though it may not have been directly expressed or even literally formulated in articulate words? Doesn't this substantially simultaneous exchange, as thus envisioned by the parties, include the process of cashing the personal check in ordinary course as part of the process of making and receiving payment?[17]

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[16]People's State Bank v. Brown (1909), 80 Kan. 520, 103 P. 102 ("the fact that Brown accepted a check did not imply an extension of credit"): Morehouse v. Keyport Auto Sales Co. (1935), 118 N.J.Eq. 368, 179 A. 279 (". . . contends that the seller extended credit to the buyer at least for the period between the time when the check was accepted and the time it was presented for payment. To that contention there is no merit. . . .").

Fullerton Lumber Co. v. Chicago M. St. P. & P. R. Co. (1931), 282 U.S. 520, 522, 75 L.ed. 502, 513, 51 S.Ct. 227 (use of ordinary checks in payment of railway freight charges does not involve extension of credit to shippers).

[17]A, South Dakota farmer, brought a few hogs to town one day in the process of marketing. B, a hog buyer, looked them over and made his offer, which A accepted. At B's direction and with B's assistance, A thereupon unloaded these hogs from his wagon into an available pen at the stock pens. B then said to A, in substance, "You may put up your horses while I go and get your check ready." This A did. About the time A had unhitched and fed the horses B returned and handed him the check. A then got out the lunch box, the contents of which he shared with his little boy C. C had been a silent but interested spectator of these business affairs taking place in the "city," a place of which this little farm boy had often heard but which it was then seldom his privilege to see. Having lunched, A thereupon went to the bank, C following, where he cashed the check, and then went to various stores to buy what he found needful and practicable on that occasion.

A was my father. I was the small boy C, at the age of about six or seven years.

Looking back at that transaction across the intervening years, I cannot imagine that either A or B had any idea, conscious or subconscious, that any credit was bargained for or given. It seems to me too plain for doubt that they treated the delivery and payment as substantially simultaneous. It seems to me equally plain that in this respect they made no distinction whatever between the interval elapsing between the delivery of the hogs and the handing over of the check and the interval elapsing between the handing over of the check and its cashing at the drawee bank a half or three-quarters of an hour later.

As it seems to me that this transaction is typical of the thousands of its kind that happen every day, it strikes me as pure fiction, not fact, to assert that the seller in such cases really intends to exchange his ownership in the goods he delivers for the check that he receives rather than for the cash he receives when the check is cashed. It seems to me perfectly clear that the parties actually treated this delivery and payment as substantially simultaneous.

Further facts in some particular case of course may show that in that instance credit was affirmatively arranged for. In such a case, of course, the rules for technical cash sales do not apply. Thus, delivery of the goods may be made on receiving a check that is post dated.[18] Thus, too, delivery may be made on the buyer's signing a conditional sale contract in the usual form.[19] More informal and ambiguous arrangements may also on occasion be so interpreted as to indicate the court's adoption of the view that the facts in the instance amount in legal effect to a typical conditional sale.[20]

III. *The Challenge on the Score of Estoppel or Apparent Authority.*

Where the buyer receives delivery on giving the seller a check for the price that on due presentation is dishonored, it may happen that before the worthlessness of the check is discovered by the seller the buyer resells and delivers to a bona fide purchaser. The transaction between the original parties being found to be a technical cash sale, it accordingly follows, unless modifying analogies from other parts of the law can be found applicable to the facts, that the original seller can prevail even against this bona fide purchaser who bought from the first buyer who as it turned out had nothing.[21]

Among the many ingenious arguments that have been adduced to "protect" the innocent purchaser against the original owner's right to retake his own goods, a very prominent place is held by the contention that the original owner is estopped by his own conduct in the instance which has served to mislead the innocent purchaser. Sometimes the phrasing used is that the original owner conferred upon the buyer apparent if not actual authority to deal with the later purchaser. The terms estoppel and apparent authority are often used substantially interchangeably, no sharp distinction between them being drawn.

Thus, where the original seller stands by and sees the buyer reselling and delivering to the innocent purchaser, he can be found to be estopped as

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[18]Such was the actual fact in Capital Automobile Co. v. Ward (1936), 54 Ga.App. 873, 189 S.E. 713, although this feature of the facts, amply justifying the actual result reached, was not emphasized in the opinion filed by the court. See, also, Wilson v. Buchenau (D. C., Cal., 1942), 43 F.Supp. 272 (delivery of goods on receiving buyer's time draft; also subsequent delay amounting to waiver).

[19]Reported examples are innumerable. Illustrations from relatively recent reports, typical in this regard, are Hanson v. Kuhn (1939), 226 Iowa 794, 285 N.W. 249; Landis Machine Co. v. Omaha Merchants Transfer Co. (1943), 142 Neb. 389, 9 N.W.2d 198, and Carter v. Seaboard Finance Co. (1949), — Cal. —, 203 P.2d 758.

[20]See Hall v. Le Croy (1949), 79 Ca.App. 676, 54 S.E.2d 468. In this case the bill of sale for a truck had on it the notation that payment was by check, and stamped on it was a statement that "title to pass on car or cars paid by check only when the check has cleared." The court treated this as an informal notation of a conditional sale, which, not being recorded as required by the conditional sale recording act, was not valid against a bona fide purchaser from the conditional buyer. The court also invoked the rulings made in Capital Automobile Co. v. Ward (1936), 54 Ga.App. 873, 189 S.E. 713.

[21]See footnotes 8 and 9 above.

against that purchaser from asserting his own right to the goods.[22] Again, the owner may provide documentary evidence that another to whom delivery is made is the owner or has authority to transfer, such as a bill of sale naming the possessor as purchaser of goods therein identified. In such cases, whether under the name of estoppel or by invoking the doctrines of apparent ownership and apparent authority, courts frequently have held that the original owner is precluded from asserting his right to the goods against an innocent purchaser from such a possessor who thus had not only possession but "indicia of title."[23]

Numerous examples appear in recent reports of cases where the facts in question have come within this application of apparent ownership or apparent authority, through the conferring of documentary "indicia of title" on a possessor, in worthless check cash sales of automobiles. In many instances the buyer on giving a worthless personal check for the price gets delivery of the automobile from the seller and the seller also fills out and delivers to the buyer a bill of sale or a certificate of title to the automobile showing the buyer as owner. In such cases the original seller after the dishonor of the check has often been held precluded from recovering the automobile from an innocent purchaser to whom in the meantime the buyer had resold or mortgaged the automobile.[24]

In present day marketing practices there is also at least one well developed and now relatively familiar application of the doctrine of apparent ownership or authority which does not involve documentary "indicia of title."

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[22]Meadows v. Hampton Live Stock Commission Co. (1942), 55 Cal.App.2d 634, 131 P.2d 591 (dictum, citing authority, on this point); Keegan v. Kaufman Bros. (1945), 68 Cal.App.2d 197, 156 P.2d 261 (cash sale seller standing by while worthless check cash buyer resold and delivered to innocent purchaser). The same application of estoppel has been found where a husband, the real owner of an apartment house and furniture, stood by without speaking while his wife, the record owner, in his presence signed a written contract to sell. (Swisher v. Clark (1949), —— Okl. ——, 209 P.2d 880.)

[23]Leading cases on the point among the earlier authorities are Pickering v. Busk (1812), 15 East 38, and Nixon v. Brown (1876), 57 N.H. 34. See, also, to the same effect, E. I. Du Pont de Nemours & Co. v. Laird (1939), ——Del Ch.——, 8 A.2d 162 (stock certificate indorsed in blank with power of attorney to transfer the same on the books of the corporation); Kretschmar v. Goven, Eddins & Co. (1939), 301 Ill.App.8, 21 N.E.2d 932 (complicated facts, same basic authorities invoked).

[24]See J. L. McClure Motor Co. v. McClain (1949), —— Ala.App. ———, 42 So.2d 266; Wolfe v. Smith (1949), 80 Ga.App. 136, 55 S.E.2d 675; Dresher v. Roy Wilmouth Co. (1948), —— Ind. App. ——, 82 N.E.2d 260; White v. Pike (1949), —— Ia. ——, 36 N.W.2d 761; Ross v. Lenci (1949), 85 N.Y.S.2d 497; Dudley v. Lovins (1949), 310 Ky. 491, 220 S.W.2d 978; Kshousky v. Passarelli (1949), —— R.I. ——, 66 A.2d 804; Southwestern Investment Co. v. Erwin (Tex.Civ.App., 1948), 213 S.W.2d 81.

The same position in substance was taken in Seward v. Evrard (1949), —— Mo.App. ——, 222 S.W.2d 509, where the original seller, a car dealer, did not himself provide the worthless check buyer with the certificate of title but delivered the car to him understanding that he also was a dealer who would take it to Arkansas where such certificates were procurable without showing earlier certificates of title. The buyer there got such new title certificates and on the strength of that certificate in turn resold to an innocent purchaser in another state.

An owner of a chattel, or an interest therein, may entrust its possession to a dealer in merchandise of that kind and authorize or permit that dealer to put it in with the stock of merchandise of that kind there displayed for sale. In such cases a sale of that chattel by such dealer in the ordinary course of business, even though in violation of his instructions, is held to pass the property interest to a bona fide purchaser for value without notice. In such cases the original owner, by delivering the goods to the dealer whose business is known to be to resell such goods, permitting him to put the goods in his stock for sale, has assisted in creating the appearance that the dealer has the right to sell them.[25] Where, however, such an unauthorized sale is not made to a purchaser in the ordinary course of business the original owner's interest is not affected thereby and can be enforced against the purchaser even though he was without notice. The appearance of authority to sell in the ordinary course of business is not regarded as justifying reliance thereon where sales are made by the dealer out of the usual course.[26]

It may be added that the common law materials are numerous and well settled as a matter of authority that an original owner's merely entrusting possession of goods to another gives rise to no estoppel against the original owner in favor of an innocent purchaser from the possessor. Such a purchaser from the possessor in such cases takes his chances. *Caveat emptor.*[27] While this matter is usually not argued at length in the reported opinions of courts, judicial expressions are at hand which have expressly recognized that since the reasons and occasions for delivering possession to another are many and various, mere possession is ambiguous with regard to the possessor's right to

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[25]See, for instance, Kearby v. Western States Security Co. (1926), 31 Ariz. 104, 250 P. 766 (automobiles); Glass v. Continental Guaranty Corporation (1921), 81 Fla. 687, 88 So. 876, 25 A.L.R. 312; General Credit, Inc., v. Universal Credit Co. (1938), 60 App.D.C. 80, 90 F.2d 115.

It would seem to follow, though reported decisions on these exact facts uncomplicated with other matters are not readily found, that if a technical cash sale seller delivers to a dealer in the same kind of goods on receiving the dealer's worthless check for the price, there being permission to the dealer to put the goods in with his stock for sale, such seller cannot recover the goods in question from an innocent good faith purchaser for value without notice who after inspection there has in the ordinary course bought the goods in question from out of such dealer's stock.

[26]A vivid illustration is C.I.T. Corp. v. Winslow First Nat. Bank (1928), 33 Ariz. 483, 266 P. 6 (entire retail stock of automobiles sold by dealer to bank in settlement of an antecedent debt, the retail dealer being then in failing condition).

[27]Typical decisions are Sherer-Gillett Co. v. Long (1925), 318 Ill. 432, 149 N.E. 225 (in absence of applicable recording acts for conditional sales good faith purchaser from conditional buyer takes subject to the conditional seller's interest); Saltus v. Everrett (1838), 20 Wend., N.Y. 267, 32 Am. Dec. 541 (mere entrusting of goods to carrier for transportation does not empower carrier to sell the goods thus in its possession).

Though the authorities on this point are minutely examined in a very critical manner, and apparently with a "jaundiced eye," in Waite (1925), Caveat Emptor and the Judicial Process, 25 Colum.L.Rev. 129-151, that writer candidly states, at page 129, that "As a matter of Anglo-American law the issue has been consistently and persistently decided in favor of the intruster of possession, adversely to him who relies on possession."

deal with the goods.[28] This ambiguity, too, is usually quite as well known to him who deals with the possessor as it is to him who entrusts possession to another.[29]

IV. *The Challenge on the Score of the Janus-faced Formula.*

Ancient Roman mythology includes an account of one of the principal Italian deities whose name we now know as Janus. The double head with which he is represented is said to have been connected with the gate that opened both ways. His two faces looked in opposite directions. Hence, we have the term, Janus-faced.

Familiar in the arguments relating to the subject matter of this paper is the Janus-faced formula or rule that "When one of two innocent persons must suffer by the act of a third person, he who put it in the power of the third person to inflict the injury shall bear the loss."[30] With minor variations in its exact wording this Janus-faced formula has often been invoked, at least as a makeweight, in judicial opinions in cases of contests between an original owner who had entrusted possession to another and an innocent purchaser who had dealt with the possessor.

The trouble with the application of this formula to such a case is that the acts of both these parties in combination are required to "put it in the power of" the third party, the possessor, to perpetrate the wrong in question. The original owner trusts the possessor not to sell goods that he is not authorized to sell. Without his act of delivery to the possessor the wrong cannot be perpetrated. Equally indispensable, however, to enabling the possessor to perpretrate the wrong is the act of the innocent purchaser who also trusts the possessor not to sell goods he is not authorized to sell. Without his act of buying from the possessor, the wrong can not be perpetrated. Under the cir-

[28]"Clothing another person with indicia of ownership does not mean simply giving him possession of a chattel. Posession is one of the indications of title, but possession may be delivered by the owner to a lessee, a bailee, an agent, or a servant. Owners of chattels must frequently intrust others with their possession, and the affairs of men could not be conducted unless they could do so with safety, so long as the possession is not accompanied by some indicium of ownership or the right to sell." Thompson, J., in Sherer-Gillett Co. v. Long (1925), 318 Ill. 432, 149 N.E. 225, at page 226 of N. E.

[29]*Cf.*, Kastner v. Andrews (1923), 49 N.D. 1059, 194 N.W. 824 ("the purchaser likewise knows the character of the business transacted by the warehouseman and knows that in the ordinary conduct of such business he will both purchase grain and receive it for storage. This carries notice that his right to sell is limited to the excess above what is required to meet the outstanding storage receipts." Birdzell, J., at page 829 of N. W.).

[30]Capital Automobile Co. v. Ward (1936), 54 Ga.App. 873, 189 S.E. 713, 714, quoting the Georgia Code, section 37-113. The California Civil Code, section 3543, phrases the wording as follows: "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer."

Broom's Legal Maxims (9th ed.), at page 463, phrases it as follows: "Whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it."

cumstances, in this kind of case, either the original owner and the innocent purchaser can both stand firmly upon this Janus-faced formula, since the other's act "put it in the power of" the wrongdoer, or neither can do so since in the case of each his own act in the instance also is indispensable to "put it in the power of" the wrongdoer to perpetrate the wrong. As a rule for decision in cases of this kind, therefore, this formula is utterly worthless.[31]

Perhaps it is unfair to call this Janus-faced formula itself a "dishonest shyster formula." It may be that in certain other types of facts the use of this formula can be helpful. Be that as it may, as a basis for solution of the controversy between the original owner who entrusts possession to another and the innocent purchaser who deals with the possessor resort to this Janus-faced formula seems little better than "dishonest shyster tactics."

Resort to this Janus-faced formula in cases of this type affords a superficially plausible explanation for whatever result has been decided upon, but the real reasons for such decisions are not thereby disclosed. These real but undisclosed reasons may consist of mere instinct, bias or prejudice. Again, they may be based on unavowed and unexplained and perhaps as yet not consciously formulated views of what is socially advantageous in view of the conflicting interests involved. Resort to this Janus-faced formula in cases of this type therefore conspicuously serves to obscure analysis and to dispense with, to confuse, or to conceal thought.

This Janus-faced formula is heavily relied upon in the relatively recent Georgia case of *Capital Automobile Co. v. Ward*,[32] in its vigorous dictum assertion[33] that "Where the true owner delivers possession of the property

[31]Waite (1925), Caveat Emptor and the Judicial Process, 25 Colum.L.Rev. 129, at pages 139-140. How utterly worthless the formula is as a rule for decision in cases of this type is readily illustrated on contrasting two conveniently available decisions, one of which cites this formula to support a decision in favor of the original owner while the other cites this formula to support a decision in favor of the innocent purchaser from the possessor. See Velsian v. Lewis (1888), 15 Ore. 539, 16 Pac. 631, 632 ("It is the buyer's own fault if he is so negligent as not to ascertain the right of the vendor to sell, and he cannot successfully invoke his *bona fides* to protect himself from liability to the true owner. . . . Every person is bound at his peril to ascertain in whom the real title to property is vested, and, however much diligence he may exert to that end, he must abide by the consequences of any mistake"); Sullivan Co. v. Larson (1948), 149 Neb. 97, 30 N.W.2d 460, 461 ("It was clearly the plaintiff who placed Worrell, the trucker, in a position such that an innocent purchaser of this corn had the right to assume that the trucker was authorized to sell and collect the purchase price of the corn, and while it is unfortunate that the plaintiff was deceived in the confidence that he placed in the trucker, yet the law has many times laid down: 'Whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.' Broom's Legal Maxims (9th ed.) 463," quoted from the earlier case of Oleson v. Albers, 130 Neb. 823, 266 N.W. 632, 635.")

[32](1936) 54 Ga.App. 873, 189 S.E. 713.

[33]Dictum on this point as asserted since the case itself involved a combination of aspects either one of which alone was amply sufficient on which to support the innocent purchaser without recourse to this Janus-faced formula. It was a credit sale by the original seller who took the buyer's post-dated check. It was also a case where the original seller furnished to his buyer "indicia of title" in the form of a written bill of sale. There was also apparent authority if not actual authority to resell

involved to another under an agreement to sell, and such person in possession, by virtue of the agreement to sell, sells the property to a bona fide purchaser . . . the element of estoppel intervenes and prevents such true owner from setting up his title as against such bona fide purchaser." This dictum, thus carefully formulated to confine its application to cases where possession has been entrusted by the original owner under some agreement to sell, has in turn been relied upon in occasional later decisions as decisive reason for precluding the original owner from recovering his goods from the innocent purchaser from the possessor.[34]

How the original owner's merely external act of delivering possession to another in contemplation of some kind of sale transaction misleads a party dealing with the possessor more or differently than delivery of possession in other cases is not apparent. The external facts of delivery of possession are the same. The private understanding on which it took place is unrevealed and unknown to others here as in other cases. It seems clear, therefore, that possession itself is as ambiguous here as in other cases and that such cases therefore actually afford no greater or different occasion for estoppel through mere entrusting of possession than is true in other cases. One may suspect, therefore, that at this point the court that thus attempts to distinguish is groping after some supposed underlying difference in policy for such cases which may be thought to justify a difference in result where there is no difference in appearances derived from the mere external facts of possession. Here, then, seems to be a small, blind groping in the judicial materials for a further substantial distinction not as yet clearly articulated by the courts. It apparently is the same distinction which the draftsman of the Uniform Revised Sales Act has attempted to describe as the original owner's having "introduced the goods into the stream of commerce."[35]

V. *The Moral Question Involved in the Question of Policy.*

Though it be candidly admitted that actual intention of parties, estoppel, apparent authority and the Janus-faced formula, all fail as adequate legal grounds for awarding the original seller's goods to the innocent purchaser from the original buyer in worthless check cash sale cases, there yet remains the question whether on independent underlying grounds such a course may be wise social policy. Relatively immature collegiate youth, in our time

based on other grounds in that one automobile dealer here handed over an automobile to another dealer for the purpose of his supplying it to his customer.

[34]Blount v. Bainbridge (1949), 79 Ga.App. 99, 53 S.E.2d 122; Hall v. Le Croy (1949), 79 Ga. App. 676, 54 S.E.2d 468.

[35]See the statement under subdivision VII below. The expression itself is found in comment 1 to section 6-303 of the proposed Uniform Commercial Code (1949 Draft). Somewhat similar views are expressed in comment 7 to section 2-405.

reared in a public atmosphere of socialistic experimentation and frequently exposed to the guiles of Marxian propaganda, is all too apt to overlook the seriousness of what is actually involved in taking one man's property without his consent and handing it over to another. At this point it therefore seems appropriate to notice that in this matter is involved some of the most vital moral concepts familiarized in the Ten Commandments and authenticated in age-long human experience.

The original seller's position in his contest with the innocent purchaser from the worthless check cash sale buyer has on his side the basic moral concepts embodied in "Thou shalt not steal," and "Thou shalt not covet . . . anything that is thy neighbor's." These basic moral concepts underlie that part of the law of civilized countries which provides for security of property. The innocent purchaser from the worthless check cash sale buyer, on the other hand, has in his favor the widely prevalent aversion to secret liens, an aversion which readily can be traced, fundamentally, to the basic moral precept, "Thou shalt not bear false witness against thy neighbor." On that foundation, too, it may readily be noticed basically rests the law of estoppel and of apparent authority. As already noticed[36] in the discussion of estoppel and apparent authority, however, mere delivery of possession is ambiguous. By itself it is no representation to others concering what property interest, if any, the possessor acquires or what authority, if any, he is permitted to exercise. Accordingly, in worthless check cash sale cases the seller has not by the mere delivery of the goods violated the precept "Thou shalt not bear false witness." It is equally clear that the innocent purchaser from the worthless check cash sale buyer, in cases where he refuses to surrender the goods to the original seller, does covet those goods of the original seller. Hence the quest on his behalf for some formula, or some analysis, under which it can be made to appear that the worthless check cash sale buyer had, after all, somehow a legal common law or statutory power of sale, within the framework of section 23, subdivision 2 of the Uniform Sales Act.[37] Thus may be scrutinized the social interest in security of transactions most readily identified in connection with negotiable documents, factor's acts, and market overt.

VI. *Analogies from Negotiable Documents, Factor's Acts, and Market Overt.*

It is familiar both in law and in business practices relating to negotiable instruments that the payee, indorsee, or other holder of such instruments is subject to chances of the burdens which the law of negotiability involves. To get the advantages of the use of such instruments he by using them submits

[36] See the statement under subdivision III above.

[37] See footnote 9 above.

himself voluntarily to the chances of such burdens. His rights in such instruments are from the outset subject to the limitation, under the law of negotiability, that protection for the holder in due course may on occasion result in cutting off the original holder's interest in the instrument. Thus, where the instrument is payable to bearer or is indorsed in blank, any possessor, even a finder or a thief, has the legal power to cut off the rightful holder by negotiating it to a holder in due course.

Similar legal incidents of negotiability have in recent decades by legislative action been extended to order bills of lading and order warehouse receipts by the Uniform Bills of Lading Act, and by the Uniform Warehouse Receipts Act, and the Uniform Sales Act with their recommended amendments.

In the case of all these negotiable documents, accordingly, the social interest in security of transactions for later holders is to the extent to which the law of negotiability goes regarded as outweighing in the scale of social values the original holder's interest in security of property in those instruments. To protect his own property interest in such instruments the original holder must at his peril keep them under his own control. The risk of their getting into the hands of another possessor, and of being transferred to a holder in due course, is thrown on the original owner rather than on the innocent purchaser from the possessor. With property of this kind, under the law of negotiability, this is one of the risks to which the owner of such property is subject.

Factor's Acts, so far as they go, point in the same direction. The most familiar illustrations of their effect, where such statutes are in force, is that a factor who has been intrusted with possession with authority to sell on behalf of his principal also is by such statutes given the legal power to make a valid pledge of the goods in his possession as security for loans to himself. These statutes throw the risk of the factor's faithlessness in dealing with this principal's goods upon the principal who selects him and intrusts him with possession instead of leaving it upon the innocent lender, an innocent purchaser to the extent of his advances, who dealt with the factor in possession.[38] So far as such statutes go, in any particular jurisdiction, therefore, they sacrifice the original owner's security of property in favor of security of transactions for later innocent purchasers. With that policy established by authority of the statute, original owners who thereafter entrust possession of their goods to factors by their own acts submit themselves to the risk of their factors' misconduct in disposing of the goods to innocent purchasers. Where factor's

[38]See Freudenheim v. Gutter (1911), 201 N.Y. 94, 99-100, 94 N.E. 640, 642; Kirsch v. Provident Loan Soc. of New York (1947), 71 N.Y.S.2d 241.

acts are in force that, too, thus is one of the risks to which the ownership of such property is subject.

In the same connection may be mentioned the special and peculiar doctrine of English law known as "Market Overt." Under this doctrine, where applicable, if the innocent purchaser buys the goods in open market he is protected against the real owner, even though the goods have been stolen from the real owner who has done nothing whatever to mislead the buyer.[39]

Goods, ordinary chattel property, of course, do not at common law come within the range of negotiability as applied to negotiable instruments. Legislatures in this country have but sparingly made changes in this direction for ordinary chattels in the limited factor's acts available. Legislatures in this country apparently have nowhere adopted the law of market overt. Protagonists for greater negotiability for goods, without changing the law by statute, to favor the innocent purchaser from the possessor at the expense of the original owner thus find but scant if any direct support in the materials presented by these analogies.[40]

VII. *"Introducing Goods Into the Stream of Commerce,"*[41] *Under the Uniform Revised Sales Act.*

Among the changes from pre-existing law which are incorporated in the Uniform Revised Sales Act is the abolition of the technical cash sale. This is provided for, notably, in section 2-401(1)(b) and in section 2-405(c) of the 1949 draft.

Section 2-401(1)(b) reads as follows: "No agreement that a contract for sale is a 'cash sale' alters the effect of appropriation or impairs the rights of good faith purchasers from the buyer."

Section 2-405(c) provides that a good faith purchaser for value to whom goods have been delivered acquires "the title of both the transferor and of any person who has made delivery to the transferor on conditional sale or on any other condition of sale if his transferor is a merchant who deals in goods of the kind."

Comment 7 to section 2-405 includes the following: "The rule of prior uniform legislation giving power to a buyer to whom documents of title have been delivered on condition of honor of a draft, to transfer good title to the goods or documents, is extended by paragraph (c) to negate the concepts of 'cash sale' or larceny as defeating the good faith purchaser and to protect such a purchaser in any case of delivery to his transferor on condition, whether the delivery be by a seller, by a conditional seller for resale, by a

[39]Pease (1908), Sale in Market Overt, 8 Colum.L.Rev. 375.

[40]See generally Waite (1925), Caveat Emptor and the Judicial Process, 25 Colum.L.Rev. 129.

[41]See footnote 35 above.

person in the position of a seller under this Article or by a financing agency." See, also, the fourth paragraph of comment 1 to section 6-303 which in this regard is to the same effect.

Examination of other portions of the Uniform Revised Sales Act discloses that this proposed legislative abolition of the technical cash sale seems to be part of a general pattern which apparently contemplates a legislative increase in the negotiability of goods. See, notably, sections 2-326, 2-405, and 6-303, with the relatively extensive comments to those sections.

It is beyond the scope of this article on worthless check cash sales to discuss in detail the numerous and important matters that are involved in this much wider legislative problem. Suffice it therefore in that perspective to remark that apparently the worthless check cash sale cases are so highly controversial in our time because they are but rarely approached in isolation but tend to be regarded as in effect a segment of the larger problem of what view to take toward any possible increase in negotiability of goods.[42]

[42]Judicial favor toward some increase in negotiability of goods, though explained in terms of the Janus-faced formula, seems to be indicated in the emphatic dicta found in Capital Automobile Co. v. Ward (1936), 4 Ga.App.873, 189 S.E. 713. See subdivision IV above, for discussion. On the other hand, judicial skepticism toward any such view of policy with regard to cash sales of chattels, at least unless adopted by legislative enactment, is emphatically expressed in Young v. Harris Cortuer Co. (1924), 152 Tenn. 15, 268 S.W. 125, 54 A.L.R. 516, and in Cowan v. Thompson (1941), —— Tenn. ——, 152 S.W.2d 1036.